STATE OF MICHIGAN

IN THE SUPREME COURT

SHIRLEY RORY and
ETHEL WOODS,

Plaintiffs/Appellees,

v.

CONTINENTAL INSURANCE COMPANY,
a CNA COMPANY

Defendant/Appellant,

_____/

Supreme Court No. 126747

Court of Appeals No. 242847

Lower Court No. 00-027278-CK

BRIEF OF *AMICUS CURIAE* FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN

Respectfully submitted,

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STATEMENT OF ORDER APPEALED FROM AND RELIEF SOUGHT

Amicus curiae Farm Bureau General Insurance Company of Michigan ("Farm Bureau") accepts and relies on the Statement Identifying Order Appealed From and Relief Sought submitted by defendant-appellant Continental Insurance Company ("appellant") for purposes of this brief.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Farm Bureau accepts and relies on the Statement of Facts submitted by appellant for purposes of this brief.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Farm Bureau supports appellant's position on appeal both to settle the validity of one-year contractual limitation clauses in uninsured ("UM") and underinsured ("UIM") policies and to clarify the circumstances[1] under which Michigan courts may refuse to enforce an unambiguous contract as written. Farm Bureau's interest in this matter is twofold, however, and it mirrors the jurisprudentially significant aspects of this case. First, like many insurers, Farm Bureau uses one-year contractual limitations in its own UM and UIM policies, and the Court of Appeals decision in this case creates substantial uncertainty regarding whether parties can expect that our courts will enforce these policies according to their terms. Second, the Court of Appeals, using a faulty legal analysis, decided that one-year limitations on the recovery of UM benefits are unreasonable, even though such limitations are consistent with both the substance and goals of Michigan's automobile insurance system.

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[1] For purposes of this discussion, Farm Bureau presupposes that there is a valid, unambiguous contract. There are many instances when courts will refuse to enforce "contracts" that lack the essential elements of assent, consideration, or certainty. Farm Bureau also concedes that under some circumstances, a party may be estopped from enforcing part of a contract, or may have waived part of a contract, *based on that party's conduct*. See, e.g., *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003) (discussing waiver); *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998) (discussing estoppel). But these doctrines are irrelevant here because they are dependent on the parties' conduct and not on the contract itself. The Court of Appeals in this case made its decision *based on the contract at issue*, and not on whether appellant waived the limitation provision or was estopped from enforcing it. The issue in this case is whether a plain and unambiguous contract clause must be enforced as written, *not* whether a party can forfeit his or her right to enforcement by some subsequent act. Neither appellants nor Farm Bureau refute this latter point.

This Court's recent jurisprudence, including *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003), *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 62; 664 NW2d 776 (2003), *Terrien v Zwit*, 467 Mich 56, 66; 648 NW2d 602 (2002), as well as *Calef v West*, 252 Mich App 443, 452; 652 NW2d 496 (2002), indicates that courts must enforce contracts as written unless they violate public policy. Historically, this Court has also held that the state may not negate a limitation period in a private contract. *Thomas Canning Co v Southern Pacific Co*, 219 Mich 388, 400-401; 189 NW 210 (1922) ("The right of the legislative body to fix a statutory period of limitation and to change or repeal it without conflicting with rights secured by the Constitution must be recognized. (Citations omitted). But the right to extend a period of limitation fixed by contract is another question. The first is recognized, the second is, to say the least, of doubtful validity.").

The Court of Appeals in this case ignored these decisions and relied on a varying "reasonableness" standard as a basis for a court's refusal to enforce an unambiguous contract as written. *Rory v Continental Ins Co*, 262 Mich App 679; ___ NW2d ____ (2004) (a copy is attached as Exhibit A for ease of reference). This "reasonableness" standard has its roots in this Court's decision in *The Tom Thomas Organization v Reliance Ins Co*, 396 Mich 588, 592; 242 NW2d 396 (1976). But such a standard not only erodes the constitutional protections on freedom of contract, it obfuscates the inherent value of contractual limitation clauses, which are common in insurance policies and, until now, commonly enforced in Michigan. See, e,g., *Hellebuyck v Farm Bureau General Ins Co*, 262 Mich App 250; 685 NW2d 684 (2004); *Morley v Automobile Club of Michigan*, 458 Mich 459, 465; 581 NW2d 237 (1998); *Williams v Continental Ins Co*, unpublished

opinion per curiam of the Court of Appeals, decided April 23, 2003, (Docket No. 229183) (attached as Exhibit B).

If every court that considers a contractual limitation provision has the option of enforcing or not enforcing that provision based on individual perceptions of "reasonableness," there is absolutely no way for parties to know if their contract will be enforced as written. If the Court of Appeals decision here is any indication, insurers may be better served placing a question mark where they would normally place a one-year limitation clause in their UIM or UM policies because it would save ink and yield the same level of certainty. It is impossible for an insurer to know the extent of the risk it is assuming when the very document that defines those risks can ultimately be rewritten.

Although this case is the first conflicting precedent in the area of UM or UIM benefits, it can be seen as another part of the intermittent approach regarding the analysis of private contractual limitations in Michigan. Some courts have enforced these provisions without referencing the "reasonableness" analysis. Other courts have examined the facts and circumstances of each case and made an independent determination regarding what is "reasonable" on those facts. The outcome of each dispute is thus dependent on the judge or judges before whom the case is heard, and not until the case is decided do the parties know if the limitation provision was worth the paper it was written on.

Dicta from *Tom Thomas* created this confusion. While its ultimate holding relied on "judicial tolling," the *Tom Thomas* Court noted that it was the first Michigan court to adopt the "reasonableness" analysis, which was then repeated in *Camelot Excavating Co, Inc v St Paul Fire and Marine Ins Co*, 410 Mich 118; 301 NW2d 275 (1981), and is now

rampant in our jurisprudence, but should have ended with this Court's recent decision in *Wilkie*, 469 Mich 41, which indicated that the written contract, and not some abject standard of "reasonableness," should control. Still, the Court of Appeals decision in this case, and others like it, persist.

Assuming *arguendo* that considering the facts and circumstances at issue was proper, the Court of Appeals decision still only tells part of the story. This Court should be fully informed of all the interests at stake, not just those of tardy plaintiffs who have neglected to comply with their insurance contracts. The Court of Appeals overlooked other salutary aspects of the one-year limitation that are consistent with the goals of our automobile insurance system and with limitations on actions generally. These aspects make the one-year limitation desirable to both insureds and insurers for three reasons: (1) it promotes full yet fair recovery; (2) it fairly allocates the costs to the premium-paying risk pool closest to the loss; and (3) it promotes the efficiency of claim handling by correlating medical investigation to the same initial one-year period that is the foundation for no-fault benefits.

A contractual limitation promotes full yet fair recovery because it serves the same purposes as a statute of limitations: "1) to encourage plaintiffs to pursue claims diligently, and 2) to protect defendants from having to defend against stale and fraudulent claims." *Lemmerman v Fealk*, 449 Mich 56, 65; 534 NW2d 695 (1995). This benefits prompt claimants, who are truly entitled to benefits, by compiling the evidence while it is still fresh. For the same reasons, it helps insurers to distinguish frivolous claims, whose lack of merit is revealed by the evidence immediately available.

It assists claimants and insurers in other ways as well. The one-year limit is designed to assure that the risks are evenly distributed among policy holders and fairly allocated to the premium-paying risk pool closest to the accident, instead of having policyholders years removed pay for stale claims. The Essential Insurance Act ("EIA") applies to all automobile insurance policies issued in Michigan. MCL 500.2105. MCL 500.2109 provides that the rate for automobile insurance cannot be "excessive." The ability to anticipate claims within a recognized time period is extremely important to establishing rates. MCL 500.2110(1) requires that "due consideration . . . be given to past and prospective loss experience within and outside this state . . . [and] to past and prospective expenses . . . ." In addition, MCL 500.2109(2) provides that "the underwriting return of . . . insurance over a period of time sufficient to assure reliability in relation to the risk associated with that insurance" must be a factor in determining whether a given rate is excessive.

When insurers set contractual limitation periods, they distribute risks closest to the period of coverage provided. Thus, the rate for UM coverage is dependent on the estimated number of such claims that will be made during the policy term, and the risk is spread among other UM policyholders. But if courts allow tardy claims to be made outside the anticipated period, this system is badly skewed. Policyholders are required to pay for claims that should have already been made, risks increase, and rates increase accordingly. Insurers must have a stable basis for limiting claims, and if they are to comply with the EIA, they must be able to count on our courts to enforce those limitations.

It cannot be overemphasized that the primary recovery for automobile accident victims is personal injury protection ("PIP") benefits, the so-called no-fault benefits. The

UM or UIM contractual limitation therefore has no effect on the insured's ability to obtain her primary recovery for medical bills, lost wages, and other services, which are all provided on a first-party basis through the No-Fault Act. The No-Fault Act is designed to take care of the basic needs that arise when an insured suffers injuries in an automobile accident. An insured may choose to buy UM or UIM coverage, but this extra coverage is only intended to substitute for excess damages the insured could have obtained from an at-fault driver. UM coverage is not statutory but contractual, and as a result, it only makes sense that the limitation on such coverage is also a part of the contract.

Applying a one-year limit to UM or UIM benefits mirrors MCL 500.3145(1), which sets a statutory one-year limit on PIP benefits. This promotes efficient claim handling by allowing insurers to deal with all clams from one accident at the same time. This, too, benefits policyholders, who ultimately pay the costs of claim handling. Adding inefficiency by allowing claimants to present UM or UIM claims out of sync with their no-fault claims benefits no one.

Appellees suggest that the one-year provision is problematic because the insured cannot be expected to have read the policy and will have trouble determining if the tortfeasor was uninsured without suing that person. Even the Court of Appeals here acknowledged that in most instances, the police report will indicate whether the tortfeasor had insurance. (Exhibit A, p 4). Moreover, an accident should prompt an insured to examine her policy to determine her rights and responsibilities. Thus, the assertion that the one-year limit is somehow "hidden" makes no sense because the accident will focus the insured's attention on the policy, which she already had a duty to read. The one-year

limit is no shorter than MCL 500.3145(1)'s statutory limit on first-party no-fault benefits, and claimants can and do submit those claims on time.

Moreover, insurers are not free to set a one-week limitation or some other similarly ridiculous period of time. The Essential Insurance Act ("EIA") requires all insurers providing automobile insurance to file their manuals and plans for such insurance to the Commissioner of Insurance for review and approval. MCL 500.2108. While not required by statute, UM and UIM coverage are regulated as automobile insurance under the EIA by 1981 AACS, R 500.1502(a) and (c). The Commissioner must therefore approve the insurance forms for UM and UIM coverage. The form approval requirement "protect[s] the public from clauses that mislead, deceive, or unreasonably deny coverage." *Michigan Chiropractic Council v Comm'r*, 262 Mich App 228, 234; 685 NW2d 728 (2004). Thus, a system of checks and balances is in place.

The Court of Appeals ignored all of these legal and practical considerations when it held that the one-year limit at issue here was "not reasonable." These considerations are shared by insurers and consumers alike, and Farm Bureau asks this Court to reverse the Court of Appeals and hold that defendant-appellant Continental Insurance Company's one-year limitation must be enforced as written.

ARGUMENT

I. UNAMBIGUOUS CONTRACTS MUST BE ENFORCED AS WRITTEN UNLESS CONTRARY TO PUBLIC POLICY, AND THERE IS NO "REASONABLENESS" EXCEPTION TO THIS RULE. THIS COURT SHOULD THEREFORE REVERSE THE COURT OF APPEALS DECISION IN THIS CASE UNDER *QUALITY PRODUCTS*, *WILKIE*, AND *TERRIEN*. MOREOVER, THIS COURT SHOULD OVERRULE *TOM THOMAS* AND ITS PROGENY TO THE EXTENT THAT THESE CASES CREATE A "REASONABLENESS" EXCEPTION TO FREEDOM OF CONTRACT.

Farm Bureau agrees with appellant's assertion that the Court of Appeals decision here is inconsistent with *Hellebuyck v Farm Bureau General Ins Co*, 262 Mich App 250; 685 NW2d 684 (2004), *Morley v Automobile Club of Michigan*, 458 Mich 459, 465; 581 NW2d 237 (1998), and other decisions upholding contractual limitation periods that shorten the otherwise applicable statutory period.

The Court of Appeals also failed to recognize the constitutional implications of refusing to enforce the parties' agreement. Michigan law recognizes that freedom of contract must yield to law and public policy, but not to an arbitrary rule of reasonableness. As a result, Farm Bureau seeks to add its voice to this dispute and to offer its support to appellant's position.

In *The Tom Thomas Organization v Reliance Ins Co*, 396 Mich 588, 592; 242 NW2d 396 (1976), the Court injected – in dicta – "reasonableness" into the analysis of contractual limitation periods. *Tom Thomas* was an anomaly in Michigan law when decided. But it quickly became the first in a series of erroneous decisions that routinely alter contracts to fit the preferences of individual judges, and the Court of Appeals decision in this case is merely the latest in this series. This Court should therefore repudiate *Tom Thomas,* and hold that only violation of law or public policy, and not some variable rule of reason, will render a contract unenforceable as written.

A. Standard of review.

Farm Bureau agrees with appellant that the proper standard of review in this matter is de novo.

B. The Court of Appeals improperly concluded that courts could refuse to enforce unambiguous contracts based on an arbitrary "reasonableness" standard that is distinct from public policy, even though this Court has held that contracts must be enforced as written unless they violate public policy.

In order to explain why "reasonableness," as contemplated by the Court of Appeals in this case and in its predecessor *Tom Thomas*, cannot be a valid basis for a refusal to enforce an unambiguous contract, an examination of the rationale behind these decisions is necessary. Farm Bureau will then contrast these decisions with this Court's recent precedent.

1. The Court of Appeals explicitly stated that it did not decide this case as a matter of public policy.

The Court of Appeals in this case refused to enforce a one-year limitation clause despite the fact that a different Court of Appeals panel had upheld and enforced such a clause in *Hellebuyck,* 262 Mich App at 250. To begin its decision, the Court stated: "We note at the outset that the issue is **solely one of reasonableness. Questions of ambiguity and public policy are not at issue.**" (Exhibit A, p 2; emphasis added). The Court again emphasized that **"the public policy of this state as expressed in its statutes is not implicated here.**" (Exhibit A, p 2; emphasis added). Respectfully, this should have ended the analysis and the Court should have ruled for the insurer at that point.

2. The Court of Appeals' purported analysis examines the facts and circumstances of each individual case without regard to the contract itself or other precedent enforcing similar contracts.

The Court then applied a fact-based, three-step, "reasonableness" analysis and refused to enforce the one-year clause. Under this analysis, a contractual limitation is "reasonable" if "(1) the claimant has sufficient opportunity to investigate and file an action, (2) the time is not so short as to work a practical abrogation of the right of action, and (3) the action is not barred before the loss or damage can be ascertained." (Exhibit A, p 3). In other words, according to the Court of Appeals, the parties cannot expect that their contract will be enforced if one of these three things fail to occur for any reason.

The Court of Appeals next distinguished *Camelot Excavating Co, Inc v St Paul Fire and Marine Ins Co*, 410 Mich 118, 123-124; 301 NW2d 275 (1981), which held that "[t]he [one-year] period [provided in the contract in that case] was reasonable," because that case did not involve the disparity in bargaining power that exists between an insurer and a policyholder. (Exhibit A, p 4). Thus, under the "reasonableness" standard, the parties cannot expect their contract to be enforced as written if the court surmises that a disparity in bargaining power existed.[2]

The Court also distinguished *Hellebuyck – even though that case upheld and enforced a one-year contractual limitation on suit to recover UIM benefits* – because "[t]he reasonableness of the one-year limitation was not considered" in that case. (Exhibit A, p 2 n 2). The Court also noted but disregarded *Williams v Continental Ins Co*, unpublished

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[2] While this is a reasonable assumption in personal automobile insurance policies, the Court of Appeals did not refer to any facts in the record in its opinion. Thus, the issue is simply subterfuge for the fact that the Court does not like the contract, and as a result, will rewrite it.

opinion per curiam of the Court of Appeals, decided April 23, 2003 (Docket No. 229183) (Exhibit B), which rejected a reasonableness argument against the same one-year limitation provision at issue here. The Court apparently thought nothing of the strange consequence that contracts enforceable in some instances will not be enforceable in others if the deciding court happens to dislike the result.

3. The "reasonableness" analysis was without precedent in Michigan law before *Tom Thomas*.

The "reasonableness" doctrine underlying the Court of Appeals decision here did not exist in Michigan jurisprudence before this Court decided *The Tom Thomas Organization v Reliance Ins Co*, 396 Mich 588, 592; 242 NW2d 396 (1976). Ostensibly, *Tom Thomas* allowed courts to refuse to enforce contractual limitation clauses on two different grounds. First, a court could refuse to enforce a contractual limitation provision if the provision was not "reasonable," despite the vagaries of that term. Second, a court could "reconcile" any imbalance in the contract by "tolling" the provision.[3] The *Tom Thomas* Court thus opened the door to "judicial discretion" regarding the enforcement of these limitation clauses in private contracts.

In that case, the plaintiff's inland marine policy contained a provision stating that "no action shall be sustainable . . . unless the same be commenced within twelve (12) months" after the policyholder discovers the occurrence that created the loss. *Tom Thomas*, 396 Mich at 592. The plaintiff failed to file suit within the one-year period but

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[3] *Tom Thomas*' "tolling" doctrine, which is actually the only holding of that case, is not at issue here. However, Farm Bureau has challenged this doctrine in a related application, *Campbell-West v Farm Bureau General Ins Co of Michigan*, Docket No. 127007. If this Court grants leave in these cases to reconsider the *Tom Thomas* decision, Farm Bureau submits that they should be consolidated to facilitate review.

argued that the defendant insurer was estopped from enforcing the one-year provision. *Id.* at 591. Instead of addressing the plaintiff's narrower estoppel argument, which, if established, would have been a valid and historically-recognized method of preventing the defendant from enforcing the limitation provision, the *Tom Thomas* Court chose to rewrite the parties' agreement.

The Court began by stating that the "general rule" that a contractual provision in an insurance policy limiting the "time for bringing suit is valid if reasonable even though the period is less than that prescribed by otherwise applicable statutes of limitation." *Tom Thomas*, 396 Mich at 592. But the Court *did not* rely on Michigan precedent for this "general rule," instead referring to an American Law Reports annotation. *Id.* at 592 n 3. In fact, the Court conceded that previous Michigan cases enforced contractual limitation provisions without considering "reasonableness," and that prior cases involving policyholders' attempts to avoid these provisions were analyzed in terms of waiver and estoppel. *Id.* at 592 n 4, 597 n 10.[4]

The Court then described and adopted the New Jersey Supreme Court's approach from *Peloso v Hartford Fire Ins Co*, 56 NJ 514; 267 A2d 498 (1970). The *Peloso* Court determined that a one-year period in a fire insurance contract "was tolled from the time an

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[4] The following *pre-Tom Thomas* cases enforced contractual limitation provisions without determining whether the provisions were reasonable. *Lombardi v Metropolitan Life Insurance Co*, 271 Mich 265; 260 NW 160 (1935) (disability insurance; two-year limitation); *Bashans v Metro Mutual Insurance Co*, 369 Mich 141; 119 NW2d 622 (1963) (casualty insurance; two-year limitation); *Dahrooge v Rochester German Insurance Co*, 177 Mich 442; 143 NW 608 (1913) (fire insurance; one-year limitation); *Betteys v Aetna Life Insurance Co*, 222 Mich 626; 193 NW 197 (1923) (disability/life insurance; one-year limitation); *Harris v Phoenix Accident & Sick Benefit Ass'n*, 149 Mich 285; 112 NW 935 (1907) (casualty insurance; six-month limitation).

insured gives notice of loss until the insurer formally denies liability." *Tom Thomas*, 396 Mich at 593-594. The *Peloso* Court was apparently unfazed by the rather radical departure of rewriting the parties' contract, and stated that "tolling" was "more satisfactory, and more easily applied" than the longstanding concept of estoppel. *Peloso*, 56 NJ at 521; cited in *Tom Thomas*, 396 Mich at 594. Like the *Peloso* Court, the *Tom Thomas* Court apparently gave little thought to the constitutional or ahistorical implications of its decision.

Remarkably, *Tom Thomas* Court declined to rely on the new "reasonableness" concept that it had injected into the analysis to justify its decision, rendering this concept mere dicta. The Court found it "unnecessary" to reach the plaintiff's arguments that the provision was unconscionable or that it was not reasonable. Instead, the Court called its decision a "reconciliation of the provisions of the policy." *Tom Thomas*, 396 Mich at 597. So even at its inception in *Tom Thomas*, the "reasonableness" doctrine was only dicta.

That the "reasonableness" doctrine arose in dicta has not stopped some Michigan courts from relying on it. By the time the Court of Appeals decided this case, the "reasonableness" inquiry had developed the three elements cited above.[5] These elements were introduced in *Camelot Excavating Co, Inc v St Paul Fire & Marine Ins Co*, 410 Mich 118, 127; 301 NW2d 275 (1981), which built on *Tom Thomas* and adopted these elements from foreign decisions. Later, decisions such as *Herweyer v Clark Hwy*

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[5] As noted, the contractual limitation is "reasonable" under this analysis if "(1) the claimant has sufficient opportunity to investigate and file an action, (2) the time is not so short as to work a practical abrogation of the right of action, and (3) the action is not barred before the loss or damage can be ascertained." In other words, the parties cannot expect that their contract will be enforced if one of these three things fail to occur for any reason.

Services, Inc, 455 Mich 14, 20; 564 NW2d 857 (1997), relied on those factors to determine whether a contractual limitation clause was "reasonable" on a case-by-case basis.

C. Courts cannot refuse to enforce contracts based on a subjective "reasonableness" requirement, but only for violations of well-recognized public policy.

Looking at the "reasonableness" doctrine as applied in this case and in *Tom Thomas*, its fundamental failure becomes clear: it wholly undermines legal certainty and the constitutional protections on freedom of contract. This Court's recent contract jurisprudence exemplifies this failure, as the "reasonableness" doctrine is everything those decisions decry: an abrogation of an unambiguous contract provision.

Both the Michigan[6] and United States[7] constitutions recognize and protect the freedom of contract. "Because of the fundamental policy of freedom of contract, the parties are generally free to agree to whatever specific rules they like, and in most circumstances it is beyond the competence of . . . the courts to interfere with the parties'

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[6] Const 1963, art 1, § 10.

[7] US Const, art 1, § 10.

choice."[8] Accordingly, an unambiguous[9] contract "**will be enforced unless it is contrary to public policy.**" *Quality Products*, 469 Mich at 375 (emphasis added).

So contrary both to *Tom Thomas* and to the Court of Appeals here, unless "the public policy of this state as expressed in its statutes" *is* at issue, courts must enforce unambiguous contracts as written. The Court of Appeals first error in this case was thus to conclude that it could refuse to enforce a contract in the absence of a public policy violation. Nor can a determination that a contract provision is "unreasonable" constitute a violation of public policy.

1. "Public policy" must be embodied in the constitution, statutes, or common law of Michigan, and does not include a subjective "reasonableness" standard, which would necessarily fluctuate with the individual preferences of judges.

To merit a refusal to enforce a valid contract, "public policy" "must be more than a different nomenclature for describing the personal preferences of individual judges, for the proper exercise of the judicial power is to determine from objective legal sources what public policy *is*, and not to simply assert what such policy *ought* to be on the basis of the subjective views of individual judges." *Terrien v Zwit*, 467 Mich 56, 66; 648 NW2d 602 (2002) (italics original). The *Terrien* Court adopted the United States Supreme Court's

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[8] *St Clair Intermediate School Dist v Intermediate Ed Ass'n*, 458 Mich 540, 570-572; 581 NW2d 707 (1998), quoting *Dep't of Navy v Federal Labor Relations Authority*, 295 US App DC 239, 248; 962 F2d 48 (1992).

[9] Appellees have failed to allege in this appeal that the one-year limitation clause was ambiguous. Our Court of Appeals held that a one-year provision similar to the one at issue here was unambiguous in *Hellebuyck*. This Court also concluded that a three-year provision was unambiguous in *Morley*, 458 Mich at 465. So there should be no question that the limitation clause is unambiguous. Appellees have also failed to allege that this clause violates public policy in this appeal; they rely solely on the "reasonableness" analysis.

conception[10] of "public policy" from *Muschany v United States*, 324 US 49, 66; 65 S Ct 442; 66; 89 L Ed 744 (1945), in this context:

> Public policy is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests. As the term "public policy" is vague, there must be found definite indications in the law of the sovereign to justify the invalidation of a contract as contrary to that policy.

Explaining this concept, the *Terrien* Court stated that:

> The public policy of Michigan is not merely the equivalent of the personal preferences of a majority of this Court; rather, **such a policy must ultimately be clearly rooted in the law.** There is no other proper means of ascertaining what constitutes our public policy. As this Court has said previously:
>
> > "**As a general rule, making social policy is a job for the Legislature, not the courts.** This is especially true when the determination or resolution requires placing a premium on one societal interest at the expense of another: "The responsibility for drawing lines in a society as complex as ours--of identifying priorities, weighing the relevant considerations and choosing between competing alternatives--is the Legislature's, not the judiciary's." (*Van v Zahorik*, 460 Mich 320, 327; 597 NW2d 15 (1999)(citations omitted)). [*Terrien*, 467 Mich at 67; emphasis added.]

In contrast to "personal preferences," the *Terrien* Court held that a public policy must be expressed in "'definite indications in the law' of Michigan" to justify refusal to enforce a contract based on that public policy. *Terrien*, 467 Mich at 68-69. Inevitably, this means that "where an actual public policy exists, rather than simply a personal policy

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[10] The term "public policy" in this context cannot be defined in precise terms. The *Terrien* Court noted that "[t]he meaning of the phrase 'public policy' is vague and variable; courts have not defined it, and there is no fixed rule by which to determine what contracts are repugnant to it." *Id.* at 69 n 13, quoting *Twin City Pipe Line Co v Harding Glass Co*, 283 US 353, 356; 51 S Ct 476; 75 L Ed 1112 (1931). So the concept of public policy must be understood in terms of where such policy can be found rather than a qualitative sense of what it is.

preference of a judge, **'definite indications' of an actual public policy will be found in our laws."** *Id.* at 78 (emphasis added). If not "grounded in the constitution, the statutes, or the common law of this state," the supposed "public policy" does not truly exist, and is instead merely an indication of the personal preferences of the deciding judge. *Id.* As the *Terrien* Court stated, "it is hard to think of a proposition less compatible with the 'rule of law' and more compatible with the 'rule of men' than that a judge may concoct 'public policies' from whole cloth, rather than from actual sources of the law." *Id.*

Under this standard, a subjective, and thus divergent "reasonableness" determination has no place in a court's decision regarding whether to enforce a contract. If a court refuses to enforce a contract, it must be because *that* contract violates objective, well-defined public policy found in our constitution, statutes, or preexisting common law, not because the facts or circumstances seem harsh. The particular circumstances of a case are irrelevant; parties may make waiver or estoppel arguments under some circumstances,[11] but they cannot avoid an unambiguous contract as a matter of law simply because the facts did not unfold in their favor. "To fail to recognize this distinction would accord the judiciary the power to examine the wisdom of private contracts in order to enforce only those contracts it deems prudent." *Id.* at 70.

A divergent "reasonableness" determination is not the "'definite indications in the law' of Michigan" required by *Terrien* to refuse to enforce a contract. This Court has recognized that reasonable minds *can* differ about the best public policy, and that is

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[11] Again, Farm Bureau does not dispute that under some circumstances a party may be estopped from enforcing part of a contract, or may have waived part of a contract, based on its own conduct. All that is at issue here is whether the contract itself is enforceable as written, notwithstanding any arguments about the parties' conduct that may be made under some circumstances.

precisely why public policy decisions are left to the Legislature. *Hanson v Mecosta Co Rd Comm'rs*, 465 Mich 492, 504; 638 NW2d 396 (2002) ("Reasonable minds can differ about whether it is sound public policy . . . . However, our function is not to redetermine the Legislature's choice or to independently assess what would be most fair or just or best public policy."). The *Terrien* Court echoed that "courts cannot disregard private contracts and covenants in order to advance a particular social good."

There can be no "definite indications" of whether a particular aspect of a contract is reasonable. In fact, taken together, this case, *Hellebuyck,* and *Camelot* provide an excellent example of why allowing lower courts to invalidate contracts based on "reasonableness" leads to divergent results. While *Hellebuyck* upheld and enforced a one-year contractual limitation on suits to recover UIM benefits, the Court of Appeals in this case held that the same one-year period was not reasonable in a UM policy. Notably, the Court of Appeals here weakly distinguished *Camelot*, 410 Mich at 123-124, which had expressly held that "[t]he [one-year] period [provided in that case] was reasonable," because that case involved a different type of contract.

2. This Court has rejected "reasonableness" as a basis for interpreting contracts in *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 62; 664 NW2d 776 (2003).

This Court has also rejected "reasonableness" as a basis for interpreting contracts in *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 62; 664 NW2d 776 (2003). If there was any doubt that the "reasonableness" doctrine was without support in current Michigan jurisprudence, *Wilkie* should dispel that doubt.

Wilkie held that courts could not refuse to enforce or rewrite an unambiguous contract based on the parties' "reasonable expectations":

> **This approach, where judges . . . rewrite the contract . . . is contrary to the bedrock principle of American contract law that parties are free to contract as they see fit, and the courts are to enforce the agreement as written absent some highly unusual circumstance such as a contract in violation of law or public policy.** This Court has recently discussed, and reinforced, its fidelity to this understanding of contract law in *Terrien v Zwit*, 467 Mich 56, 71; 648 NW2d 602 (2002). **The notion, that free men and women may reach agreements regarding their affairs without government interference and that courts will enforce those agreements, is ancient and irrefutable.** It draws strength from common-law roots and can be seen in our fundamental charter, the United States Constitution, where government is forbidden from impairing the contracts of citizens, art I, § 10, cl 1. Our own state constitutions over the years of statehood have similarly echoed this limitation on government power. It is, in short, an unmistakable and ineradicable part of the legal fabric of our society. Few have expressed the force of this venerable axiom better than the late Professor Arthur Corbin, of Yale Law School, who wrote on this topic in his definitive study of contract law, Corbin on Contracts, as follows:
>
> > "One does not have 'liberty of contract' unless organized society both forbears and enforces, forbears to penalize him for making his bargain and enforces it for him after it is made." (15 Corbin, Contracts (Interim ed), ch 79, § 1376, p 17.) [*Wilkie*, 469 Mich at 62; emphasis added.]

In light of these "bedrock" principles, the *Wilkie* Court concluded that it would not be "reasonable" for any party to expect that a contract would not be enforced as written. The Court twice emphasized the following rationale on this point from *Raska v Farm Bureau Mutual Ins Co*, 412 Mich 355, 362-363; 314 NW2d 440 (1982):

> **The expectation that a contract will be enforceable other than according to its terms surely may not be said to be reasonable.** If a person signs a contract without reading all of it or without understanding it, under some circumstances that person can avoid its obligations on the theory that there was no contract at all for there was no meeting of the minds.
>
> **But to allow such a person to bind another to an obligation not covered by the contract as written because the first person thought the other was bound to such an obligation is neither reasonable nor just.** [Emphasis added.]

So in *Wilkie*, 469 Mich at 51-52, and *Raska*, 412 Mich at 362-363, this Court held that it is not "reasonable" to enforce a written contract other than according to its plain terms. But that is exactly what the Court of Appeals did here. The contract said that appellees had one year from the date of the accident to file a claim or a suit. The Court refused to apply the one-year period, holding that the suit was timely because it was filed within three years. (Exhibit A, p 4). But appellant did not agree to three-year period, and it is neither reasonable nor just to bind appellant to it.

3. Appellees' focus on the "reasonableness" of the one-year limitation demonstrates the pitfalls of this analysis.

Relying on the Court of Appeals' erroneous analysis, appellees' sole argument is that the one-year clause at issue here is "unreasonable."[12] But this begs the question of whether "reasonableness" is even relevant to this inquiry. Under *Quality Products*, 469 Mich at 375, *Terrien*, 467 Mich at 67, and *Wilkie*, 469 Mich at 51, it is not.

Appellees' position also illustrates the undesirable results of allowing courts to consider "reasonableness" when enforcing contracts, as appellees distinguish cases involving nearly identical contracts on their facts. They distinguish *Morley* because the contractual limitation was three years in that case, as opposed to the one-year limit at

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[12] In a last ditch effort and without any real argument, appellees attach a Kent County Circuit Court opinion ruling that MCL 500.2254 prohibits one-year contractual limitation clauses. Not only has this issue not been properly raised or briefed below in this case, our Court of Appeals has rightly rejected it. *Campbell-West v Farm Bureau General Ins Co of Michigan*, unpublished opinion per curiam of the Court of Appeals, decided August 3, 2004, (Docket No. 251003) (attached as Exhibit C) ("We consolidated these actions to address the issue of whether MCL 500.2254 prohibits insurers from including provisions in their policies limiting the insureds may file suit to collect benefits that have been denied to less than the time provided in the applicable statute of limitations. We hold that it does not.").

issue here, even though the wording of both clauses is nearly identical.[13] They also distinguish *Williams* and *Hellebuyck* because those decisions were allegedly "purely made based upon ambiguity with no thought as to reasonableness."[14] These arguments have nothing to do with the contracts themselves but depend on the extra-contractual circumstances.

Why have a contract if the circumstances of each case, and not the contract, dictate the rules the parties must follow? One can easily imagine a set of facts that would make the rights and duties under any contract difficult to carry out. But that does not make the contract any less enforceable. Any other result would end the need for agreements between parties because the courts would always normalize their relationship to fit the circumstances.

4. Because of its fundamental inconsistency with this Court's precedent, this Court should reverse the Court of Appeals decision and overrule the "reasonableness" doctrine once and for all.

The subjective "reasonableness" doctrine allows courts to decide to enforce, or not to enforce, contracts on a case-by-case, divergent basis that has much more to do with what the court thinks about the case than what the contract says. "Reasonableness" is therefore not a valid principle of Michigan public policy, and is not a valid basis for a court to refuse to enforce an unambiguous contractual clause under *Quality Products*, 469 Mich

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[13] The provision at issue in *Morley*, 458 Mich at 463, stated that "suit must be filed within 3 years from the date of the accident." The provision at issue here states that "[c]laim or suit must be brought within 1 year from the date of accident."

[14] In fact, *Williams* did consider a "reasonableness" argument and rejected it. (Exhibit B, p 2),

at 375, *Terrien*, 467 Mich at 67 and *Wilkie*, 469 Mich at 51. To the extent that the Court of Appeals held otherwise in this case, this Court should reverse that decision. And to the extent the dicta in *Tom Thomas* and its progeny conflict with this holding, this Court should overrule those decisions as well.

II. TO THE EXTENT THAT APPELLEES ARGUE THAT THE COURT OF APPEALS DECISION WAS BASED ON PUBLIC POLICY GROUNDS, THE ONE-YEAR LIMITATION CLAUSE AT ISSUE HERE IS NOT CONTRARY TO MICHIGAN'S PUBLIC POLICY.

A. Standard of review.

Farm Bureau agrees with appellant that the proper standard of review in this matter is de novo.

B. Michigan has no constitutional provisions, statutes, or common law that prohibits one-year limitations in UM or UIM policies, and therefore no public policy against such limitations.

Based on the above, public policy embodied in our constitution, statutes, or common law was the only valid basis under which the Court of Appeals could have refused to enforce the one-year contractual limitation in this case. *Terrien*, 467 Mich at 67. As noted, the Court of Appeals explicitly stated that "[q]uestions of ambiguity and public policy are not at issue." As a result, this Court should reject any attempt to re-characterize the Court of Appeals decision as a public policy decision in a "wrong reason, right result" justification.

Even if analyzed as a public policy decision, however, the Court of Appeals opinion fails to withstand review. The *Terrien* Court held that a public policy must be expressed in "'definite indications in the law' of Michigan" to justify refusal to enforce a contract based on that public policy. *Terrien*, 467 Mich at 68-69. As noted, this means that the policy at

issue must be found in our constitution, statutes, or common law: "the laws actually enacted into policy by the public and its representatives." *Id.* at 69 n 13.

The only "definite indications" in Michigan's constitution, statutes, or common law regarding contractual limitations reflect that such limitations are common and enforceable. Neither party has asserted that our constitution is implicated in this matter. There are also no Michigan statutes that generally prohibit such contractual provisions.[15] Only one such statute exists in Michigan: MCL 500.4046(2) prevents contractual limitations in life insurance policies.

No other such statutes, specific or general, exist for insurance policies. The absence of such statutes, especially in light of MCL 500.4046(2), indicates that our Legislature has considered the public policy implications of such limitations and decided that they should be prohibited in life insurance policies, but not in any other context.

Examining our common law, Michigan courts routinely recognize that insurance policies may contain valid provisions that alter or shorten the statutory limitation period for bringing suit. See, e.g., *Bashans v Metro Mutual Ins Co*, 369 Mich 141, 143-144; 119 NW2d 622 (1963); *Commissioner of Insurance v Central West Casualty Co*, 301 Mich 427, 435; 3 NW2d 830 (1942); *Barza v Metropolitan Life Ins Co*, 281 Mich 532, 538-539; 275 NW 238 (1987).

This Court recognized the absence of public policy against such contractual limitations in Michigan in *Camelot Excavating*, 410 Mich at 139, when it stated that there

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[15] Such a statute would obviously be something other than an applicable statute of limitations, or else contractual limitations would never be allowed. Instead, it must be a "statute [that] prohibits a contractual shortening of the statutory limitation period." *Meridian Mutual Ins Co v Caveletto*, 553 NE2d 1269, 1270 (Ind App, 1990).

is "**no general policy or statutory enactment in this state which would prohibit private parties from contracting for shorter limitation periods than those specified by general statutes.**" (Emphasis added). The Court then *explicitly rejected* a public policy objection to a *one-year limit* on suit in an insurance contract, stating: "**We find no violation of public policy or basic unfairness in allowing the enforcement of this private contractual period of limitation, even though shorter than the statutory period normally applicable.**" *Camelot Excavating*, 410 Mich at 136 (emphasis added).

In light of *Camelot*, it is impossible to conclude that there are "definite indications" in Michigan law that would prohibit such one-year limitations, regardless of differences in the type of insurance policy at issue. As a result, any attempt to assert that a one-year contractual limitation period is contrary to public policy must fail.

CONCLUSION AND RELIEF REQUESTED

Public policy – as decided by our Legislature – is the only basis for a court's refusal to enforce an unambiguous contract as written. "Reasonableness" cannot be determined as a matter of public policy, and therefore cannot be a valid basis for a refusal to enforce a contract. This Court's decisions in *Quality Products*, 469 Mich at 375, *Terrien*, 467 Mich at 67, and *Wilkie*, 469 Mich at 51, all lead to this conclusion.

Despite these principles, *Tom Thomas*' dicta stands for the proposition that a contractual limitation period must be "reasonable" to be enforceable. This clearly improper rule has led to a series of conflicting decisions regarding contractual limitations of all types, and has culminated in the confusion caused by the Court of Appeals decision in this case and its conflict with *Williams* and *Hellebuyck*. As long as the "reasonableness" doctrine is allowed to stand, this confusion will only deepen, and the plain language of contracts will mean less and less in Michigan jurisprudence.

In order to ensure that Michigan courts will enforce unambiguous contracts as written and to maintain consistency in our jurisprudence regarding contractual limitation periods, this Court should reverse the Court of Appeals decision in this case and overrule the "reasonableness" doctrine, along with *Tom Thomas* and its progeny.

Respectfully submitted,

WILLINGHAM & COTÉ, P.C.

Dated: November 4, 2004

BY: _____

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EXHIBIT A

STATE OF MICHIGAN

COURT OF APPEALS

SHIRLEY RORY and ETHEL WOODS, Plaintiffs-Appellees, v CONTINENTAL INSURANCE COMPANY, also known as CNA INSURANCE COMPANY, Defendant-Appellant.	FOR PUBLICATION July 6, 2004 9:05 a.m. No. 242847 Wayne Circuit Court LC No. 00-027278 Official Reported Version

Before: Borrello, P.J., and White and Smolenski, JJ.

PER CURIAM.

Defendant Continental Insurance Company (Continental) appeals by leave granted the circuit court's order denying it summary disposition. The question is whether the contractual provision in defendant's uninsured motorist endorsement providing that a "[c]laim or suit must be brought within 1 year from the date of the accident" is reasonable. We hold that it is not, and we affirm.

I

On May 15, 1998, plaintiffs were injured in an automobile accident. Defendant was their insurer. On or about September 21, 1999, plaintiffs brought a first party no-fault suit against defendant and a third party no-fault suit against the other driver, Charlene Denise Haynes. Plaintiffs then learned that Haynes was uninsured. Plaintiffs notified defendant of their uninsured motorist claim on March 14, 2000. Defendant denied coverage and, on August 18, 2000, plaintiffs brought this second lawsuit against defendant for uninsured motorist benefits.

With respect to uninsured motorist benefits, plaintiffs' insurance policy provided: "Claim or suit must be brought within 1 year from the date of accident." Defendant moved for summary disposition, relying on this provision. The circuit court denied the motion, citing *Timko v Oakwood Custom Coating, Inc,* 244 Mich App 234; 625 NW2d 101 (2001). The circuit court reasoned that the insurance policy's one-year filing limitation had to be unreasonable, because it was shorter than the three-year statute of limitations that applied to an action against the tortfeasor, and concluded:

> Here, the Plaintiffs gave their insurance carrier notice of an uninsured motorist claim one year and ten months after the accident. This is over one year less than the Plaintiffs would have by statute to file a third party negligence lawsuit against the negligent driver, wherein Plaintiff[s] would ascertain whether the tortfeasor was in fact insured or uninsured. Consequently, the shortened period of limitations in this case acts as a practical abrogation of the right of action, and also bars the action before the loss or damage can be ascertained. As such, the shorter period of limitation in this matter is unreasonable.

Defendant sought leave to appeal from this ruling, which was denied. On April 23, 2002, this Court released an unpublished opinion in *Williams v Continental Ins Co*, unpublished opinion per curiam of the Court of Appeals (Docket No. 229183), holding that the one-year limitation on filing an underinsured motorist claim and bringing a lawsuit was not so unreasonable as to be unenforceable. Defendant then brought a second motion for summary disposition, noting that the same clause was at issue. Stating that it was not bound by *Williams* and disagreed with it, the circuit court again denied the motion. It concluded that this clause in effect reduced the six-year statute of limitations applicable to an insurance contract action to one year and pointed out that the clause was likely not brought to the parties' attention when they entered into the contract. Further, it concluded that it was unreasonable in light of the three years given by statute to bring a serious impairment claim, because it often takes three years to investigate or determine whether there is a serious impairment justifying a claim. Defendant then sought leave to appeal, which this Court granted by order dated October 11, 2002.

II

We note at the outset that the issue is solely one of reasonableness. Questions of ambiguity and public policy are not at issue. The Supreme Court, in *Morley v Auto Club of Michigan,* 458 Mich 459; 581 NW2d 237 (1998), and this Court, in *Hellebuyck v Farm Bureau General Ins,* 262 Mich App 250; ___ NW2d ___ (2004),[1] application for leave to appeal pending, have held that similar provisions are unambiguous.[2] Further, an earlier statute requiring that uninsured motorist coverage be provided unless rejected in writing, MCL 500.3010, was repealed when the no-fault insurance scheme was enacted. Thus, the public policy of this state as expressed in its statutes is not implicated here.[3]

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[1] Defendant filed a supplemental authority brief citing *Hellebuyck.*

[2] Neither *Morley* nor *Hellebuyck* addressed the issue of the reasonableness of the contractual limitation. *Morley* only involved the issue whether the policy was ambiguous. The contractual provision in *Morley* provided for a three-year limitations period, and its reasonableness was not addressed. *Hellebuyck* also addressed only the issue of ambiguity. The reasonableness of the one-year limitation was not considered.

[3] A number of courts have invalidated insurance contract provisions shortening the time in which to file uninsured motorist claims. We do not rely on these cases because they were decided in jurisdictions that have statutes requiring that uninsured motorist insurance be offered, as was the case in Michigan before the repeal of an earlier MCL 500.3010. See *Farmers Ins Exch v*
(continued...)

Generally, the terms of an insurance contract will be enforced as written when no ambiguity is present. *Morley, supra* at 465. However, where a contract provision shortens the otherwise applicable statute of limitations, the shortened period must be reasonable. In *Timko, supra,* the Court explained:

> [P]arties may contract for a period of limitation shorter than the applicable statute of limitation provided that the abbreviated period remains reasonable. The period of limitation "is reasonable if (1) the claimant has sufficient opportunity to investigate and file an action, (2) the time is not so short as to work a practical abrogation of the right of action, and (3) the action is not barred before the loss or damage can be ascertained." *Herweyer* [*v Clark Hwy Services, Inc,* 455 Mich 14, 20; 564 NW2d 857 (1997)], citing *Camelot Excavating Co, Inc v St Paul Fire & Marine Ins Co,* 410 Mich 118, 127; 301 NW2d 275 (1981). [*Timko,* 244 Mich App 239-240.]

The *Timko* Court concluded that a six-month contractual limitation was reasonable on the basis of these three prongs where six months was deemed sufficient to investigate and file an age discrimination claim.

In *Herweyer,* 455 Mich 16, the plaintiff signed an employment contract that gave him six months after the termination of his employment to commence an action related to his employment. The contract also contained a "saving" clause that provided that if a provision of

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(...continued)

Horenburg, 43 Mich App 91; 203 NW2d 742 (1972), in which the Court of Appeals invalidated a one-year contractual limitations period for filing uninsured-motorist claims as violative of the public policy sought to be achieved by requiring uninsured-motorist coverage unless rejected in writing by the insured. Nevertheless, to the extent these cases discuss the reasonableness of the contractual limitations in light of the coverage provided by the endorsement, they are instructive.

See *Gordon v Kentucky Farm Bureau Ins Co*, 914 SW2d 331, 332 (Ky, 1995) (one-year contractual limitation period was held unreasonably short during which to make an uninsured motorist [UM] claim); *Elkins v Kentucky Farm Bureau Mut Ins Co*, 844 SW2d 423 (Ky App, 1992) (one-year period of limitations in UM policy to file suit was unreasonably short and such period "would completely frustrate the no-fault insurance scheme"); *Brown v State Auto Property & Cas Ins Cos*, 189 F Supp 2d 665, 671 (WD Ky, 2001) (applying Kentucky law, the court held a two-year contractual limitation on bringing underinsured motorist [UIM] benefits claim unreasonable, noting that *Gordon* demonstrated that "it is illogical . . . to require a plaintiff to sue her own insurer for uninsured motorist benefits before being required to discover whether or not the tortfeasor is in fact [uninsured or underinsured . . . and] prior to being required to sue the tortfeasor . . . ."); *Miller v Progressive Cas Ins Co,* 69 Ohio St 3d 619, 624; 635 NE2d 317 (1994) (one-year contractual limitations period to make UM/UIM claim was held void as against public policy); *Sandoval v Valdez,* 91 NM 705; 580 P2d 131 (NM App, 1972) (one-year limitations period in policy providing uninsured motorist coverage held invalid as against general personal injury statute of limitations); and *Burgo v Illinois Farmers Ins Co,* 8 Ill App 3d 259; 290 NE2d 371 (1972) (one year limitations period contained in UIM policy was held invalid, so the statute of limitations applicable to contract actions would govern).

the contract is found to be legally unenforceable as written, the agreement shall be limited to allow its enforcement as far as legally possible. The circuit court expressed reservations about enforcing the six-month period of limitations, but concluded that, even if that term were unreasonable, the thirty-one-month period taken by the plaintiff was unreasonable. That Court did not directly address whether that limitation was reasonable, holding that, even if it were unreasonable, the plaintiff did not file within the minimum reasonable time in excess of six months that was arguably provided for by a saving clause. *Herweyer v Clark Hwy Services, Inc,* 212 Mich App 105, 108; 537 NW2d 225 (1995). In the Supreme Court, the issue was whether the lower courts had properly held that the contract's saving provision could be read to require that any claims be brought within the minimum reasonable period. 455 Mich 18-19. The Supreme Court reversed, holding that the saving clause was vague and ambiguous, that uncertain periods of limitations such as might be found based on the saving clause were undesirable, and that the statutory limitations period was an objective indicator of what was reasonable. It held that "[c]ourts should defer to the statutory period unless the period in the parties' contract is specific and reasonable." 455 Mich 24. In the course of reaching this conclusion, the Court stated:

> Employment contracts differ from bond contracts [like the one at issue in *Camelot Excavating Co,* 410 Mich 118]. An employer and employee often do not deal at arm's length when negotiating contract terms. An employee in the position of plaintiff has only two options: (1) sign the employment contract as drafted by the employer or (2) lose the job. Therefore, unlike in *Camelot* where two businesses negotiated the contract's terms essentially on equal footing, here plaintiff had little or no negotiating leverage. Where one party has less bargaining power than another, the contract agreed upon might be, but is not necessarily, one of adhesion, and at the least deserves close judicial scrutiny. [455 Mich 21.]

III

The statute of limitations for bringing a claim based on a breach of contract, such as the insurance contract here, is six years. MCL 600.5807(8). The statute of limitations for bringing a claim against a negligent driver for bodily injury is three years. MCL 600.5805(10).

The uninsured motorist endorsement at issue provides that a claim or suit must be brought within one year of the accident. We conclude that the one-year contractual limitations period is not reasonable under *Timko* and *Herweyer*. Uninsured motorist coverage pays compensatory damages that a covered person is legally entitled to recover from the owner or operator of an uninsured motor vehicle because of a bodily injury sustained by the covered person caused by an accident arising out of the ownership, maintenance, or use of an uninsured motor vehicle. The owner or operator of the uninsured vehicle is only subject to tort liability for noneconomic loss if the injured (covered) person has suffered death, serious impairment of a body function, or permanent serious disfigurement. MCL 500.3135(1). MCL 500.3135(7) defines "serious impairment of a body function" as "an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life." An insured may not have sufficient time to ascertain whether an impairment will affect his ability to lead a normal life within one year of an accident. Indeed, three of the factors to be

considered in determining whether a serious impairment exists are the duration of the disability, the extent of residual impairment, and the prognosis for eventual recovery. *Kern v Blethen-Coluni*, 240 Mich App 333, 341; 612 NW2d 838 (2000). Further, unless the police report indicates otherwise, the insured will not know that the other driver is uninsured until suit is filed, and the other driver fails to tender the defense to an insurance company. The insured, thus, must file suit well before the one-year period in order to assure that the information is known in time to make a claim or file suit against the insurance company within one year of the accident. Applying the standard set forth in *Camelot, supra* at 127, and repeated in *Herweyer* and *Timko,* we conclude that the limitation here is not reasonable because, in most instances, the insured (1) does not have "sufficient opportunity to investigate and file an action," where the insured may not have sufficient information about his own physical condition to warrant filing a claim, and will likely not know if the other driver is insured until legal process is commenced, (2) under these circumstances, the time will often be "so short as to work a practical abrogation of the right of action," and (3) the action may be barred before the loss can be ascertained.

We further note that the concern the Court expressed in *Herweyer* is present here as well. The insured had the option of accepting uninsured motorist coverage or rejecting it, but could not have bargained for a longer limitations period. Accordingly, the policy should receive close judicial scrutiny.

Although of no importance in this case because plaintiffs made a claim within three years, we observe that while *Herweyer* might be read to require that the six-year contract period of limitations be applied in lieu of the one-year policy provision, we think *Herweyer* is distinguishable because application of the saving clause there would have resulted in no definite limitations period, only a reasonableness standard to be applied in every case. Here, the Legislature has provided a three-year limitations period for personal injury claims. The insured must sue the other driver within three years of the injury, whether or not the insured has sufficient information to know if a serious impairment has been sustained, *Stephens v Dixon,* 449 Mich 531; 536 NW2d 755 (1995), and whether or not the other driver is insured. Application of the three-year period would not deprive the insured of a sufficient opportunity to investigate and file a claim and does not work a practical abrogation of the right.

Affirmed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Helene N. White
/s/ Michael R. Smolenski

EXHIBIT B

STATE OF MICHIGAN

COURT OF APPEALS

CARVAN WILLIAMS,

Plaintiff-Appellant,

v

CONTINENTAL INSURANCE COMPANY, a/k/a CNA INSURANCE,

Defendant-Appellee.

UNPUBLISHED
April 23, 2002

No. 229183
Wayne Circuit Court
LC No. 00-000194-CK

Before: Gage, P.J., and Griffin and G. S. Buth*, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition in favor of defendant. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

This is an action to recover underinsured motorist benefits under a no-fault insurance policy issued to plaintiff by defendant. Plaintiff sustained neck and back injuries in a February 19, 1997, collision. On February 6, 1998, he filed suit against defendant for first party no-fault benefits. On July 1, 1998, plaintiff's attorney sent defendant a letter stating that plaintiff had been advised that the other driver's no-fault policy limits were only $20,000 and he was therefore claiming entitlement to underinsured motorist benefits. When defendant failed to respond, plaintiff brought this action. Defendant then moved for summary disposition pursuant to MCR 2.116(C)(7) and (8), contending that the claim for underinsured motorist benefits was untimely under the provision of the parties' underinsured motorist coverage endorsement stating that a "[c]laim or suit must be brought within 1 year from the date of the accident." The trial court agreed and dismissed the action.

On appeal, plaintiff contends that the trial court erred in granting summary disposition in favor of defendant. This Court reviews a trial court's grant of summary disposition de novo. *Spiek v Dep't of Transportation,* 456 Mich 331, 337; 572 NW2d 201 (1998). The construction and interpretation of an insurance contract is a question of law that is also reviewed de novo. *Henderson v State Farm Fire & Casualty Co,* 460 Mich 348, 353; 596 NW2d 190 (1999).

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* Circuit judge, sitting on the Court of Appeals by assignment.

Plaintiff first argues that his suit for first party benefits served as notice of the potential for additional claims, including a claim for underinsured motorist coverage. A similar argument was rejected by our Supreme Court in *Morley v Automobile Club of Michigan,* 458 Mich 459; 581 NW2d 237 (1998). There, the plaintiffs were involved in a collision in November 1987, they filed an action for first-party benefits in April 1990, and they claimed entitlement to coverage under an uninsured motorist endorsement in August 1991. Their insurer informed them that they were not entitled to uninsured motorist benefits because they had not claimed them within three years of the date of the accident as required by the policy. *Id.* at 462-463. The Court rejected the plaintiffs' argument that their report of the accident and notice to the insurer under the general no-fault provisions of the contract was sufficient to qualify as a claim for uninsured motorist benefits, reasoning that the no-fault claim procedure did not inform the insurer of the fact that insureds believed the tortfeasor was uninsured. *Id.* at 468. Similarly, in this case, plaintiff's suit for first-party benefits made no mention of a possible underinsured motorist claim. Under *Morley,* plaintiff's argument that he timely notified defendant of a possible underinsured motorist claim fails.

Plaintiff also argues that it is unreasonable to expect an injured driver to file a claim for underinsured motorist coverage within a year of the accident and urges this Court to adopt an interpretation of the provision that would allow coverage when a claim is filed within a year of discovering that the allegedly negligent driver was underinsured. We decline to do so. *Sallee v Auto Club Ins Ass'n,* 190 Mich App 305, 307-308; 475 NW2d 828 (1991). Moreover, we conclude that because the policy requires filing a claim of entitlement to underinsured motorist coverage within the one-year period, and not necessarily a lawsuit for failure to provide such coverage, the one-year claims period is not so unreasonable as to be unenforceable.

Affirmed.

/s/ Hilda R. Gage
/s/ Richard Allen Griffin
/s/ George S. Buth

EXHIBIT C

STATE OF MICHIGAN

COURT OF APPEALS

MOSES ROBINSON and GWENDOLYN LEWIS,

Plaintiffs-Appellees,

v

ALLIED INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED
August 3, 2004

No. 247375
Kent Circuit Court
LC No. 02-003347-CZ

JANE CAMPBELL WEST and JOE ELDON WEST, JR.,

Plaintiffs-Appellees,

v

FARM BUREAU GENERAL INSURANCE CO.,

Defendant-Appellant.

No. 251003
Charlevoix Circuit Court
LC No. 02-001558-CH

Before: Fort Hood, P.J., Donofrio and Borrello, JJ.

PER CURIAM.

In Docket No. 247375, defendant Allied Insurance Company appeals as of right from an order denying its motion for summary disposition and a subsequent order granting plaintiffs' motion for summary disposition. In Docket No. 251003, defendant Farm Bureau General Insurance Company appeals as of right from an order denying its motion for summary disposition. We consolidated these actions to address the issue of whether MCL 500.2254 prohibits insurers from including provisions in their policies limiting the insureds may file suit to collect benefits that have been denied to less than the time provided in the applicable statute of limitations. We hold that it does not. Because plaintiffs in Docket No. 247375 did not file their action within the one-year limitation period provided in their insurance contract, after applying judicial tolling, we conclude plaintiffs' action was barred, and reverse the trial court's order

denying defendant's motion for summary disposition. In Docket No. 251003, because of the operation of the judicial tolling doctrine, we affirm the trial court's order denying defendant Farm Bureau's motion for summary disposition.

FACTS AND PROCEDURAL HISTORY

Docket No. 247375

In Docket No. 247375, plaintiffs Robinson[1] obtained a homeowners' property insurance policy from defendant Allied through their mortgage lender. Defendant issued the policy on December 18, 2000, with an expiration date of December 18, 2001. However, defendant cancelled the policy on February 26, 2001 after an inspection of plaintiffs' property revealed safety and building code violations. The policy contained a provision stating, "Suit Against Us. No action can be brought unless the policy provisions have been complied with and the action is started within one year after the date of loss."

According to plaintiff Moses Robinson, he became aware of a problem with his home when he received two abnormally high water bills. Sometime during the period when his daughter, Ghainne Robinson, was home from college for Christmas break in December 2000, plaintiffs discovered a leak in the home's water heater. The leak flooded the basement and damaged the furnace and many of plaintiffs' clothes and personal items. Robinson stated that he obtained a new water heater on January 4, 2001, but was unable to install it or present a claim to defendant until spring of 2001 because he was seriously ill. Robinson also stated that he did not initially know who his insurance carrier was or that his insurance policy covered the loss.

Robinson reported plaintiffs' claim to defendant on August 17, 2001, claiming that the loss occurred in December 2000 before the policy was cancelled. Defendant's claims adjuster, Barry Frodge, inspected plaintiffs' home and obtained a recorded statement on August 30, 2001. According to Robinson's affidavit testimony, Frodge called him approximately a week after the meeting and made a settlement offer of $3,000, that Robinson rejected. Frodge sent a letter to plaintiffs on September 6, 2001 denying their claim because, based on defendant's investigation, the exact date that the leak occurred could not be ascertained. It also stated that the water bills plaintiffs had provided during Robinson's recorded statement indicated the loss occurred after plaintiffs' policy had been cancelled on February 26, 2001. The letter quoted several provisions from plaintiffs' policy regarding losses that were not covered by it, as well as certain conditions that an insured must fulfill before a claim would be paid.

On September 17, 2001, plaintiffs sent Frodge a letter and an itemized list of damages claiming their losses exceeded $30,000, but stating that they would accept $10,000 if defendant remitted payment before October 1, 2001. On October 2, 2001, plaintiffs' attorney sent a letter to Frodge requesting a copy of plaintiffs' policy asking why their claim had been denied. Frodge responded to the October 2, 2001 inquiry on November 19, 2001 with a letter reiterating that

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[1] According to affidavits introduced in the trial court, plaintiff Gwendolyn Lewis now goes by the name Gwendolyn Lewis-Robinson.

plaintiffs' claim was denied because the damage had not been discovered until after plaintiffs' policy had been cancelled. The letter did not restate the policy provisions. On December 13, 2001, plaintiffs' counsel sent another letter to Frodge stating that he believed plaintiffs' loss did occur within the policy period, and attaching copies of plaintiffs' water bills that revealed an increased amount of water usage in the last quarter of 2000. On December 21, 2001, Frodge responded with another letter stating that the documentation plaintiffs had provided to support their contention that the water leak had occurred in the last quarter of 2000 demonstrated that the loss occurred, not after the cancellation date, but before the policy became effective on December 18, 2001. Again, the letter did not restate the policy provisions.

Plaintiffs filed suit on April 2, 2002, approximately one and a half years after they discovered the leak in December 2000, alleging that defendant had wrongfully denied their claim. Plaintiffs moved for summary disposition pursuant to MCR 2.116(C)(10), asserting there was no genuine issue of fact that their loss occurred within the policy period. After answering plaintiffs' complaint, defendant filed its own motion for summary disposition pursuant to MCR 2.116(C)(8) and (10) asserting that plaintiffs' claim was barred by the contractual one-year limitation period. Following a hearing on defendant's motion only, the trial court issued a written opinion denying defendant's motion based on its determination that MCL 500.2254 prohibits the inclusion of such contractual limitation periods in policies for insurance.

Thereafter, the trial court issued a second written opinion granting plaintiffs' motion for summary disposition, determining that plaintiffs had introduced sufficient evidence to sustain their burden of proving that no genuine issue of fact existed regarding whether their loss occurred after the policy took effect. The court relied on plaintiff Gwendolyn Lewis-Robinson and Ghainne Robinson's affidavits stating that the loss occurred during the Christmas holiday when Ghainne Robinson was home from college for Christmas break, and that plaintiff had discovered the leak sometime between Christmas and New Year's. The trial court also determined that defendant had affirmatively withdrawn the other defenses it had stated in its September 6, 2001 denial letter by not reasserting them in its subsequent letters, and that those defenses were not preserved by a reservation of rights clause that defendant had included in each of the three denial letters that it sent to plaintiffs.

Docket No. 251003

In Docket No. 251003, plaintiff Jane West was injured in an automobile accident on June 20, 1999.[2] At the time of the accident, plaintiffs maintained an automobile insurance policy with defendant Farm Bureau Insurance Company in accordance with the Michigan no-fault automobile insurance act, MCL 500.3101 *et seq.* The policy included a provision for $100,000

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[2] Plaintiffs state the date of the accident as June 30, 1999 in their complaint. However, defendant stated June 20, 1999 as the date of the accident in its answer, motion for summary disposition, at the subsequent hearing, and in an affidavit provided by its claims adjuster. Plaintiffs did not seek to correct this assertion. Nonetheless, the exact date of the accident is inconsequential to our resolution of the issues presented.

of underinsured motorist coverage, and also contained a clause stating that "[n]o claimant may bring a legal action against the company more than one year after the date of the accident."

On September 5, 2002, more than three years and two months after the accident, plaintiffs filed suit alleging that plaintiff Jane West had sustained serious impairment of body function as a result of the accident, and that defendant had breached its contract with plaintiffs by failing to remit $100,000 in underinsured motorist benefits under the policy. Plaintiff Joe West also claimed a loss of consortium.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(7), (8), and (10) based on plaintiffs' failure to commence their action within the one-year contractual limitation period provided in the policy. Following a hearing, the trial court, relying on the reasoning set forth in the written opinion by the trial court in Docket No. 247375, denied defendant's motion on the ground that the contractual one-year limitation period contained in the policy was invalid under MCL 500.2254. As an alternative ground, the trial court also held that the one-year limitation period, even if not invalidated by MCL 500.2254, was tolled because defendant had never formally denied plaintiffs' claim.

ANALYSIS

In this appeal, both defendants Allied and Farm Bureau assert that the trial courts erred in denying their motions for summary disposition by determining that the one-year limitation periods contained in their policies are invalid under MCL 500.2254. Both defendants also assert that plaintiffs failed to file suit within the one-year limitation periods, thus barring their claims. In addition, defendant Allied also asserts that the trial court in Docket No. 247375 erred in granting plaintiffs' subsequent motion for summary disposition based on its determination that there was no genuine issue of fact regarding whether plaintiffs' loss occurred within the policy period, and that defendant was barred from asserting any defenses stated in its September 6, 2001 letter of denial other than that the loss did not occur within the effective dates of the insurance policy.

I. Standard of Review

A trial court's decision on a motion for summary disposition is reviewed de novo. *Hazle v Ford Motor Co,* 464 Mich 456, 461; 628 NW2d 515 (2001). Whether MCL 500.2254 prohibits the insertion of limitation periods less than the applicable statute of limitations within insurance policies presents an issue of statutory interpretation, which is a question of law that is also reviewed de novo. *People v Davis*, 468 Mich 77, 79; 658 NW2d 800 (2003). Finally, this Court also reviews de novo the issue of whether a limitations period precludes a party's pursuit of an action. *Detroit v 19675 Hasse*, 258 Mich App 438, 444; 671 NW2d 150 (2003).

A motion for summary disposition pursuant to MCR 2.116(C)(7) is appropriate where "[t]he claim is barred because of . . . statute of limitations." *Timko v Oakwood Custom Coating, Inc*, 244 Mich App 234, 238; 625 NW2d 101 (2001). All well-pleaded factual allegations and documentary evidence is construed in the plaintiff's favor, and summary disposition is only appropriate where reasonable minds could not differ as to whether the plaintiff's action is barred by the limitation period. *Jackson Co Hog Producers v Consumers Power Co,* 234 Mich App 72, 77; 592 NW2d 112 (1999). A motion under MCR 2.116(C)(8) is appropriately granted when,

accepting all well-pleaded factual allegations as true and construing them in the light most favorable to the plaintiff, the claims alleged in the complaint are clearly unenforceable as a matter of law and no factual development could justify recovery. *Maiden v Rozwood*, 461 Mich 109, 119-120; 461 NW2d 817 (1999). A motion under MCR 2.116(C)(10) is appropriately granted when, viewing the documentary evidence submitted by the parties in a light most favorable to the nonmoving party, no genuine issue of material fact exists except as to the amount of damages and the moving party is entitled to judgment as a matter of law. *Id.* at 120; MCR 2.116(C)(10).

II. MCL 500.2254

Defendants argue that the trial courts erred when they found that the one-year limitation periods contained in their policies were invalid under MCL 500.2254. Specifically, defendants argue that the one-year contractual limitations periods do not violate MCL 500.2254 because they are merely conditions and thus, are not provisions "prohibiting a member or beneficiary from commencing and maintaining suits." Because the one-year limitations provided in the respective contracts do not forbid or prevent plaintiffs from "commencing and maintaining suits," and merely provide that any such suits must be brought within one-year, we agree.

MCL 500.2254 provides:

> Suits at law may be prosecuted and maintained by any member against a domestic insurance corporation for claims which may have accrued if payments are withheld more than 60 days after such claims shall have become due. No . . . policy provision adopted by any life, disability, surety, or casualty insurance company doing business in this state prohibiting a member or beneficiary from commencing and maintaining suits at law or in equity against such company shall be valid and no such . . . provision . . . shall hereafter be a bar to any suit in any court in this state: Provided, however, That any reasonable remedy for adjudicating claims established by such company or companies shall first be exhausted by the claimant before commencing suit: Provided further, however, That the company shall finally pass upon any claim submitted to it within a period of 6 months from and after final proofs of loss or death shall have been furnished any such company by the claimant.

Under MCL 600.5807(8), the statute of limitations for filing an action "to recover damages or sums due for breach of contract" is six years unless another period is specified for the specific type of contract in MCL 600.5807(1) through (7). The six-year period provided in MCL 600.5807(8) applies to insurance contracts. *Monti v League Life Ins Co*, 151 Mich App 789, 796; 391 NW2d 490 (1986). Our Supreme Court adopted the rule that the limitation period must be tolled "from the time the insured gives notice until the insurer formally denies liability" in order to ensure that an insured has the full twelve-month period to commence the action. *The Tom Thomas Organization, Inc, v Reliance Ins Co*, 396 Mich 588, 592, 596-597; 242 NW2d 396 (1986). The trial court in Docket No. 247375, however, concluded that the common law general rule has been abrogated by MCL 500.2254, a determination the trial court in Docket No. 251003 adopted. Specifically, the trial court in Docket No. 247375 focused on the "absent statute" language contained within the general rule, *Tom Thomas, supra,* 592 and determined that MCL 500.2254 prevents the application of the general rule to contracts of insurance.

The primary purpose of statutory construction is to discern and give effect to the intention of the Legislature. *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 748; 641 NW2d 567 (2002). In doing so, the first step is to review the language of the statute itself. *In re MCI Telecommunications Complaint*, 460 Mich 396, 411; 596 NW2d 164 (1999) "If the language of the statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written. No further judicial construction is required or permitted." *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). Moreover, "[i]t is a maxim of statutory construction that every word of a statute should be read in such a way as to be given meaning, and a court should avoid a construction that would render any part of the statute surplusage or nugatory," and "a court should refrain from speculating about the Legislature's intent beyond the words employed in the statute." *MCI, supra,* 414-415. "Only where the statutory language is ambiguous may a court properly go beyond the words of the statute to ascertain legislative intent." *Sun Valley, supra,* 236.

"Unless defined in the statute, every word or phrase of a statute will be ascribed its plain and ordinary meaning." *Robertson, supra*, 748, citing MCL 8.3a; *Western Mich Univ Bd of Control v Michigan*, 455 Mich 531, 539; 565 NW2d 828 (1997). "Prohibit" is defined as "to forbid (an action, activity, etc.) by authority or law," or "to forbid the action of (a person)," or "to prevent; hinder." *Random House Webster's College Dictionary* (1997), 1040-1041.

Plaintiffs assert that the contractual limitation provisions violate the statute because they prohibit actions filed beyond one year. Specifically, plaintiffs contend that the statute invalidates any provision within an insurance policy that has the effect of prohibiting the commencement or maintenance of *any* suit. Our plain reading of the statute does not support plaintiffs' interpretation because the statute merely states that insurance companies may not adopt policy provisions prohibiting the commencement or maintenance of a suit, and that any such prohibition will not be a bar to any suit. It does not prevent the insertion of provisions that only place a condition on filing suit without providing an outright bar to their commencement. MCL 500.2254.

Despite initially recognizing that the contractual limitation periods are a condition to an insured's ability to file suit rather than a prohibition, the trial court in Docket No. 247375 concluded that MCL 500.2254 voids the inclusion of such conditions in insurance policies. The trial court relied on the statute's statements that "Provided, however," an insured must exhaust all reasonable remedies for adjudicating claims provided in the contract before filing suit and "further" that the insurer must "finally pass" upon an insured's claim within six months of the insured's providing "final proofs of death or loss." The trial court reasoned that the term "prohibiting" as used in the statute does not refer to provisions absolutely barring the commencement of a suit, but refers to the setting of conditions. The trial court determined that MCL 500.2254 permits insurers to include only two conditions within policies: that insureds (1) exhaust any alternative remedies before filing suit, and (2) wait six months after submitting a claim before filing suit. The trial court in Docket No. 251003 agreed.

Plainly, the use of the word "prohibiting" refers to an absolute bar to the commencement and maintenance of suits rather than to conditions placed on the commencement and maintenance of suits, and we conclude its determination that MCL 500.2254 allows only two conditions to be placed in insurance contracts erroneous. The trial court, in essence, applied the maxim of *expressio unius est exclusio alterius*, providing that the Legislature's express mention

of one thing in a statute generally implies that it meant to exclude similar things it did not mention in the statute. *Bradley v Sarnac Community Schools Bd of Ed*, 455 Mich 285, 298; 565 NW2d 650 (1997); *Houghton Lake Area Tourism & Convention Bureau v Wood*, 255 Mich App 127, 151; 662 NW2d 758 (2003). The maxim is only an aid in determining legislative intent and cannot be applied if it defeats that intent. *Houghton Lake, supra,* 151. The maxim is inapplicable here because the provisions within MCL 500.2254 relied on by the trial court are not an express mention by the Legislature of conditions that insurers may provide in contracts. Rather, they are duties the Legislature has imposed on insureds to exhaust available remedies before filing suit and on insurers to promptly pass upon claims.

We also note for comparison purposes, that MCL 500.4046(2), also contained within the Insurance Code of 1956 but pertaining only to policies for life insurance, expressly prohibits the inclusion of a provision limiting the time a suit may be commenced to less than six years. MCL 500.2254, however, is a general provision governing disability, surety, casualty, and also life insurance policies, and contains no such express prohibition against limiting the time an action may be commenced. It states only that no policy provision may be adopted "prohibiting a member or beneficiary from commencing or maintaining suits . . . ." We view this distinction as intentional, and conclude that MCL 500.2254 may not be construed to prevent the inclusion of provisions that do not act as a complete bar to filing suit, but only limit the time it may be done.

Bolstering our conclusion regarding MCL 500.2254 is MCL 500.2833(q) that applies to fire insurance policies, such as the one at issue in Docket No. 247375. MCL 500.2833(q) provides that "[a]n action must be commenced within 1 year after the loss or within the time period specified in the policy, whichever is longer. The time for commencing an action is tolled from the time the insured notifies the insurer of the loss until the insurer formally denies liability." In Docket No. 247375 the trial court noted that the one-year limitation period contained in the contract was unreasonable. This pronouncement is without merit given the Legislature's mandate that policies like the one issued by defendant Allied contain the one-year limitation period. Because the plain language of the statute mandates that such a policy of insurance contain the one-year limitation, reasonableness is not open to interpretation or determination by the trial court or this Court. *Sun Valley, supra,* 236.

For all of these reasons we conclude the trial courts erred in denying defendants' motions for summary disposition on the ground that MCL 500.2254 prohibits a provision within an insurance contract that limits the time within which an insured may file suit to one year rather than the six-year statute of limitations provided in MCL 600.5807(8).

III. Judicial Tolling

Docket No. 247375

In Docket No. 247375, defendant Allied asserts that the trial court erred in denying its motion for summary disposition because, even with the application of the judicial tolling period provided in *Tom Thomas, supra,* 596-597, plaintiffs did not file suit within one year from the date of loss as provided in the insurance policy. Although Allied raised this argument in its motion for summary disposition, the trial court did not address it because of its determination that that the contractual limitation period was invalidated by MCL 500.2254. Nonetheless, we will review this issue because it presents a question of law and the facts necessary for resolution

have been presented. *Pro-Staffers, Inc v Premier Mfg Support Services, Inc,* 252 Mich App 318, 324; 651 NW2d 811 (2002).

An issue of fact exists regarding the exact date of loss. In its ruling on plaintiffs' motion for summary disposition, however, the trial court determined that plaintiffs had introduced sufficient evidence to establish that the date of loss occurred in late December 2000, after plaintiffs' insurance policy came into effect on December 18, 2000. Based on the trial court's determination and viewing the evidence in the light most favorable to plaintiffs as the nonmoving party, we assume for the purposes of this issue that the loss occurred on December 31, 2000.[3] It is undisputed that plaintiffs filed their complaint on April 3, 2002, approximately 489 days after the date of loss.

Plaintiffs reported their loss on August 17, 2001. Defendant denied plaintiffs' claim on September 6, 2001. Basing the tolling period on these dates, the one-year contractual limitation period was tolled for approximately twenty days. Thus, plaintiffs' suit would be barred by the contractual one-year limitation provided in the policy because they filed their complaint approximately 469 days after the date of loss.

Although they have not responded to defendant's assertions in their brief to this Court, we note that plaintiffs asserted below that the tolling period should not be deemed to have started on August 17, 2001 because plaintiff Moses Robinson testified that in June and July 2001 he attempted obtain the name of his insurer and his policy number, but was unable to procure assistance. Thus, plaintiffs' contended the tolling period should have begun on June 1, 2001. Plaintiffs also asserted that the tolling period should be deemed to have ended on December 21, 2001, rather than on September 6, 2001, because that is when Frodge sent his last letter. Following plaintiffs' schema, the tolling period would have been approximately 204 days, making their suit timely.

Defendant correctly asserts that the tolling period ended on September 6, 2001. Although it did not specifically address the tolling issue, the trial court determined that Frodge's September 6, 2001 letter was not a final denial for the purposes of whether defendant had preserved the other defenses it attempted to assert to plaintiffs' motion for summary disposition. However, the rule adopted by our Supreme Court in *Tom Thomas, supra,* 596-597, is that the limitation period is tolled "until the insurer *formally* denies liability" not at the conclusion of correspondence between the parties. (Emphasis added). Frodge's September 6, 2001 denial letter was a formal denial of liability, and the tolling period ended on that date.

Plaintiffs also asserted that Frodge's December 21, 2001 letter should be considered as the end of the tolling period rather than the September 6, 2001 letter because defendant is statutorily obligated by MCL 500.2254 to "finally pass" upon claims submitted to it within six

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[3] The determination of the exact date of loss is not material to the resolution of this issue. Specifically, in his affidavit, plaintiff Robinson testified that he purchased a new water heater on January 4, 2001. Therefore, the latest date on which the loss could have occurred was January 4, 2001. However, as will be seen below, the period of four days will not be of consequence.

months of the insured's having provided final proofs of loss. Plaintiffs' assertion is without merit because MCL 500.2254 merely mandates that defendant make its final denial within six months of having received the final proofs of loss. It does not require that an insurer's denial of a claim be its final denial for the purposes of ending the judicial tolling period adopted by our Supreme Court in *Tom Thomas, supra,* 596-597.

Plaintiffs also argue that defendant waived the contractual one-year limitation period. Plaintiffs based their assertion on the fact that both Frodge's September 6, 2001 and November 13, 2001 letters of denial contained a clause stating, "[i]f you are aware of any facts that are unknown to us, please call them to our attention so that we may consider them. If additional information develops which changes the facts as presented, please notify us. If I can be of any assistance, do not hesitate to contact me."

Our Supreme Court defined the doctrine of waiver as a judicially created exception to the general rule that a period of limitation runs without interruption. *Cincinnati Ins Co v Citizens Ins Co,* 454 Mich 263, 270; 562 NW2d 648 (1997). Its application precludes the defendant from asserting the limitation period as a defense and, therefore, extends the applicable period for filing suit. *Id.* The elements of equitable estoppel are as follows:

> One who seeks to invoke the doctrine generally must establish that there has been (1) a false representation or concealment of a material fact, (2) an expectation that the other party will rely on the misconduct, and (3) knowledge of the actual facts on the part of the representing or concealing party. This Court has been reluctant to recognize an estoppel absent intentional *or negligent* conduct designed to induce a plaintiff to refrain from bringing a timely action. [*Cincinnati, supra,* 270 (citation omitted; emphasis in opinion).]

Frodge did not promise to pay plaintiffs' claim, commence negotiations, or fail to deny the claim in the September 6, 2001 letter. Rather, the letter expressly denies plaintiffs' claim. Frodge's letters do not amount to intentional or negligent conduct designed to induce plaintiffs to refrain from filing suit within the contractual limitation period. *Cincinnati, supra,* 270.

In support of their argument, plaintiffs also pointed to the affidavit testimony of Robinson and Wassenaar that Frodge called Robinson approximately a week after Frodge inspected plaintiffs' home on August 30, 2001 and offered him a settlement of $3,000. Robinson further testified that he rejected the offer, that Frodge stated that "he would see what he could do," and that one of defendant's representatives called him a few days later to inform him that defendant was not going to pay the claim. Even viewing the evidence in the light most favorable to plaintiffs and assuming that Frodge did make such an offer, it does not invoke the doctrine of estoppel. Defendant's denial of plaintiffs' entire claim on September 6, 2001 came after plaintiff rejected a $3,000 settlement offer. Moreover, by Robinson's own testimony, Frodge made the offer that he declined within approximately a week of the August 30, 2001 meeting, and a representative of defendant promptly notified him that defendant was denying plaintiffs' entire claim "a few days" after Robinson denied the settlement offer. We do not believe that defendant's actions induced plaintiffs to refrain from filing suit, or denied them a reasonable amount of time to file suit.

Even assuming that the tolling period began on June 1, 2001, plaintiffs' claim would still be untimely because the tolling period ended on September 6, 2001. The limitation period would be tolled for approximately ninety-eight days, meaning that plaintiffs' complaint was filed approximately 391 days after the date of loss. Therefore, we decline to address plaintiffs' contention that the tolling period should be deemed to have begun on June 1, 2001.[4]

The trial court in Docket No. 247375 erred by denying defendant Allied's motion for summary disposition. Because we have concluded that plaintiffs' action against defendant was barred by the contractual limitation period, we decline to address defendant's other assertions of error.

Docket No. 251003

In Docket No. 251003, defendant Farm Bureau asserts that the trial court erroneously denied its motion for summary disposition on the alternative ground that plaintiffs' complaint was timely filed because defendant never formally denied their claim, leaving the limitation period tolled.

Defendant contends the trial court erred in applying the tolling doctrine. Defendant asserts that uninsured, or underinsured, motorist coverage is not required by statute but is contractual. For that reason, it asserts that the language of the insurance policy must govern when benefits are awarded, and that judicial tolling may not be applied because the policy does not contain a tolling provision. Defendant essentially contends that the trial court's application of the tolling doctrine adopted by our Supreme Court in *Tom Thomas, supra,* 596-597, equated to its rewriting the contract and abrogating the contractual one-year limitation.

Indeed, underinsured motorist benefits, like uninsured motorist benefits, are not required by statute. *Mate v Wolverine Mutual Ins Co*, 233 Mich App 14, 19; 592 NW2d 379 (1998); *Auto-Owners Ins Co v Harvey*, 219 Mich App 466, 470; 556 NW2d 517 (1996). "The scope, coverage, and limitations of underinsurance protection are governed by the insurance contract and the law pertaining to contracts." *Mate, supra,* 19. However, defendant's assertion that judicial tolling cannot be applied is misguided.

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[4] We decline to review this issue for two reasons. First, although an independent insurance agency is ordinarily considered to be an agent of the insured rather than the insurer, *Auto-Owners Ins Co v Michigan Mutual Ins Co*, 223 Mich App 205, 215; 565 NW2d 907 (1997); *Harwood v Auto-Owners Ins Co*, 211 Mich App 249, 254; 535 NW2d 207 (1995), the parties in this case have offered no evidence regarding whether the Campbell Agency is an independent agent or whether its actions can be imputed to defendant. Second, even if such evidence had been presented and we were to conclude that the Campbell Agency was acting as an agent for defendant, we do not believe that its actions of refusing to help plaintiffs file their claim in June and July of 2001 invokes the doctrine of estoppel, because it does not equate to intentional or negligent action designed to induce plaintiffs to refrain from filing their complaint within the one-year limitation period. *Cincinnati, supra,* 454 Mich 270. In contrast, such refusals by their insurer to accept their claim should have prompted plaintiffs to file suit sooner rather than later.

Plaintiffs' complaint is founded on breach of contract for refusal to pay benefits[5]. In the absence of the contractual one-year limitation period contained in the policy, the time period plaintiffs could file suit would be governed by the six-year statute of limitations set forth in MCL 600.5807(8). *Monti, supra,* 796. Therefore, the contractual limitation is valid as long as it is reasonable and its running is tolled from the date of the accident, as is provided in the policy, until defendant formally denied liability.[6] *Tom Thomas, supra,* 592, 596-597.

Defendant argues that the trial court erred in determining that plaintiffs' complaint was not barred by the one-year contractual limitation because defendant never formally denied liability. The accident occurred on June 20, 1999. Absent tolling, plaintiffs had until June 20, 2000 to file their complaint. Plaintiffs actually filed their complaint on September 5, 2002, more than three years and two months after the accident occurred.

The parties do not dispute that the tolling period began on February 24, 2000, when plaintiffs' attorney made a demand for $100,000 in uninsured motorist benefits, the extent of their policy, to defendant's claims adjuster, Bradley Copeland, during a telephone conversation. Defendant asserts the tolling period also ended on that date because Copeland testified by affidavit that he made a counteroffer during the conversation to settle plaintiff's claim for $25,000. Defendant argues that Copeland's counteroffer was a denial of plaintiffs' claim as a matter of law.

Although a counteroffer is a rejection of an offer for the purposes of contract formation, precluding a meeting of the minds, this canon of contract law is inapplicable. *Harper Bldg Co v Kaplan*, 332 Mich 651, 656; 52 NW2d 536 (1952), quoting *Thomas v Ledger*, 274 Mich 16, 21; 263 NW 783 (1935); *Giannetti v Cornillie*, 204 Mich App 234, 237; 514 NW2d 221, rev'd on other grounds 447 Mich 998; 525 NW2d 459 (1994). *Tom Thomas* plainly states that the judicial tolling period does not end "until the insurer formally denies liability." In this context, defendant's counteroffer was just that, a counteroffer, and not a formal denial of liability. We reject defendant's contention that Copeland's counteroffer was a denial of plaintiffs' claim as a matter of law.

According to Copeland's affidavit testimony, he made the counteroffer on February 24, 2000 and plaintiff's attorney informed him on March 31, 2000 that he wished to hold off on any

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[5] Plaintiff Joe West's loss of consortium claim is derivative, and is dependent upon plaintiff Jane West's breach of contract claim. *Long v Chelsea Comm Hosp*, 219 Mich App 578, 589; 557 NW2d 157 (1996).

[6] Another panel of this Court recently held in the context of an uninsured motorist claim that a contractual provision stating "Claim of suit must be brought within 1 year of the date of the accident" is unreasonable. *Rory v Continental Ins Co*, ___ Mich App ___; ___ NW2d ___ (Docket No. 242847, July 6, 2004). We can envision a fact pattern where the one-year limitation may be reasonable, but we need not reach this issue due to our determination on the judicial tolling issue. It should be further noted that *Rory* concerns an automobile policy and not a homeowners' policy with statutorily mandated provisions as exists in Docket No. 247375 involving defendant Allied.

settlement negotiations until his client underwent surgery on April 4, 2000. Approximately five months later, Copeland attempted to contact plaintiff's attorney by leaving a phone message regarding further settlement negotiations on September 5, 2000. Plaintiff's attorney made no contact with Copeland until July 19, 2002, almost two years later, when he demanded arbitration.

Based on these facts, we must apply the plain language of *Tom Thomas, supra*, and conclude that because there has been no formal denial of the claim, formal denial to pay, or patent negotiation to impasse, judicial tolling did not expire. We affirm the trial court's denial of defendant's motion for summary disposition.

CONCLUSION

MCL 500.2254 does not prohibit insurers from including provisions in their policies that limit the time insureds may file suit to collect benefits that have been denied to less than the time provided in the applicable statute of limitations. However, these limitation periods must be tolled from the time the insured gives notice of his claim until the insurer formally denies liability for the claim. A counteroffer is not a formal denial of liability. And, the limitation period is tolled until the claim is formally denied, not at the conclusion of correspondence between the parties.

Accordingly, the order of the trial court denying defendant Allied's motion for summary disposition in Docket No. 247375 is reversed, as is its subsequent order granting plaintiffs' motion for summary disposition. The trial court shall grant defendant's request for summary disposition. In Docket No. 251003, the order of the trial court denying defendant Farm Bureau's motion for summary disposition is affirmed.

Affirmed in part, reversed in part, and remanded to the respective trial courts consistent with this opinion. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ Pat M. Donofrio
/s/ Stephen L. Borrello